Supreme Court, U.S.
FILED

941097 DEC 20 1994

OFFICE OF THE CLERK

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOAN V. HARRIS,
Petitioner,

v.

PAUL HIRSH,
Respondent.

Petition for a Writ of Certiorari to the New York Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

DANIEL F. MCCARTHY
DANIEL A. MCCARTHY
36 West 44th Street
New York, NY 10036

MITCHELL M. KRAUS
3 Research Place
Rockville, MD 20850

MARK D. SCHNEIDER
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

1. Whether the "labor contract" preemption doctrine derived from the Railway Labor Act is separate and distinct from the "labor contract" preemption doctrine derived from § 301 of the Labor Management Relations Act?

2. Whether a state law cause of action brought by an employee covered by a collective bargaining agreement is preempted by the Railway Labor Act where the claim as pleaded, and in substance, does not seek to vindicate rights created by that agreement, or require the interpretation or application of the agreement, but the defendant-employer alleges that the agreement's construction is at issue as part of a negating or affirmative defense?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. The Facts	2
B. The Proceedings Below	3
REASONS FOR GRANTING THE WRIT	7
A. The New York Decision Conflicts With This Court's Decision in *Hawaiian Airlines, Inc. v. Norris*	3
B. The State Courts and Federal Courts of Appeals Are Split on the Question Whether Labor Contract Preemption Analysis Is Claim Centered	10
CONCLUSION	16

TABLE OF AUTHORITIES

CASES Page

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) 10, 15-16
Capraro v. United Parcel Service, 993 F.2d 328 (3rd Cir. 1993) 12
Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711 (1945) 5, 9
Fox v. Parker Hannifin Corp., 914 F.2d 795 (6th Cir. 1990) 11
Galvez v. Kuhn, 933 F.2d 773 (9th Cir. 1991) 10
Hanks v. General Motors Corp., 859 F.2d 67 (8th Cir. 1988) 12
Hawaiian Airlines, Inc. v. Norris, 114 S. Ct. 2239 (1994) 7-9
Hirras v. National Railroad Passenger Corp., 1994 U.S. App. Lexis 33082 (5th Cir., No. 92-5753, Nov. 22, 1994) 11
Jackson v. Kimel, 992 F.2d 1318 (4th Cir. 1993) ....
Jackson v. Liquid Carbonic Corp., 863 F.2d 111 (1st Cir. 1988) 12
Johnson v. Anheuser Busch, Inc., 876 F.2d 620 (8th Cir. 1989) 12
Laws v. Calmat, 852 F.2d 430 (9th Cir. 1988) 12
Lingle v. Norge Division of Magic Chef Inc., 486 U.S. 399 (1989) 6, 8, 10
Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) 6
Livadas v. Bradshaw, 114 S. Ct. 2068 (1994) ..... *passim*
Local No. 57 v. Bechtel Power Corp., 834 F.2d 884 (10th Cir. 1987) 11
Lorenz v. CSX Transport Inc., 980 F.2d 263 (4th Cir. 1992) 9
Loughry v. Lincoln Bank, 67 N.Y.2d 369 (N.Y. Ct. App. 1986) 13
Magerer v. John Sexton & Co., 912 F.2d 525 (1st Cir. 1990) 12
Melanson v. United Airlines, Inc., 931 F.2d 558 (9th Cir.), *cert. denied*, 112 S. Ct. 189 (1991) 5
Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985) 15

TABLE OF AUTHORITIES—Continued

Page

O'Shea v. Detroit News, 887 F.2d 683 (6th Cir. 1989) 11

Utility Workers v. Southern California Edison, 852 F.2d 1083 (9th Cir. 1988) 12

STATUTES

28 U.S.C. § 1257(a) 2

Labor Management Relations Act

29 U.S.C. § 185 ..... 6, 8-9

National Labor Relations Act

29 U.S.C. § 151, *et seq.* 6

Railway Labor Act

45 U.S.C. § 151, *et seq.* ..... *passim*

MISCELLANEOUS

Note, The Need for a New Approach to Federal Preemption of Union Members' State Law Claims, 99 Yale L.J. 209 (1989) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. ——

JOAN V. HARRIS,

Petitioner,

v.

PAUL HIRSH,

Respondent.

Petition for a Writ of Certiorari to the New York Court of Appeals

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Joan V. Harris hereby petitions this Court to issue a writ of *certiorari* to review the judgment of the New York State Court of Appeals in *Harris v. Hirsh*, 83 N.Y.2d 734 (1994).

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 83 N.Y.2d 734, and is reprinted in the appendix to this *certiorari* petition ("Pet. App.") at 1a. The Order of the Supreme Court of New York, Appellate Division, dismissing the complaint, is reported at 196 A.D.2d 425, 601 N.Y.S. 2d 275, and is reprinted at Pet. App. 11a. The judgment of the Supreme Court of New York, Bronx County, after jury trial, in favor of plaintiff, is unreported and is reprinted at Pet. App. 14a. The decision of the Supreme Court of New York, Appellate Division, reinstating plaintiff's case for trial is re-

ported at 161 A.2d 452, and is reprinted at Pet. App. 16a. The judgment of the Supreme Court of New York, Bronx County, granting defendant's motion for summary judgment is unreported and is reprinted at Pet. App. 19a. The order of the New York Court of Appeals denying the motion for rehearing is unreported and is reprinted at Pet. App. 20a.

JURISDICTION

The New York Court of Appeals issued its opinion on June 9, 1994, and its order denying a timely motion for rehearing on September 29, 1994. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

Section 1a of the Railway Labor Act, 45 U.S.C. § 151a, provides:

> The purposes of this chapter are: . . . (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation of application of agreements covering rates of pay, rules, or working conditions.

Section 3, First (i), of the Railway Labor Act, 45 U.S.C. § 153 First (i), provides:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board. . . .

STATEMENT OF THE CASE

A. The Facts

Petitioner Joan V. Harris was an employee of Metro-North Commuter Railroad ("Metro North") from 1977 throughout the period in question in this case. During

that time, Harris was represented for purposes of collective bargaining by the Brotherhood of Railway, Airline and Steamship Clerks ("BRAC"), and was covered by a collective bargaining agreement between Metro-North and BRAC.

In July of 1986, the director of Harris' department at Metro North, respondent Paul Hirsh, called Harris into his office and in the presence of two other supervisory personnel, said: "You have a problem. You take drugs. . . . I know a person who is on drugs and you look like one." These remarks were later widely circulated among Harris' co-workers.

The undisputed evidence at the subsequent trial showed that Hirsh's statement was untrue. That evidence showed, too, that at the time he made this statement, Hirsh had been told by Harris' two immediate supervisors that she was *not* taking drugs, and that in summoning Harris to his office and in making his statements, Hirsh had not followed, and, indeed, had not consulted Metro-North's written operating procedures regarding suspected drug abuse.

B. The Proceedings Below

(a) *Lower Court Proceedings:* In 1987 Harris brought a slander action in New York State Supreme Court against Hirsh. Prior to trial, Hirsh moved for summary judgment, on the ground that the statement in question was made in the context of an employer-employee relationship, and so is entitled to a qualified privilege under state law. The trial court granted the motion, but the intermediate state appellate court reversed.

That appellate court reasoned that, assuming *arguendo* that the statements were entitled to a qualified privilege under New York law, the privilege claim could be defeated if the plaintiff could establish that the statements were known to be false at the time they were made, and were motivated by malice. Reviewing the evidence, the court determined that there was evidence a jury could

find persuasive sufficient to establish each of these points, "[i]ndeed, the evidence before us makes it abundantly clear that the statements may well have exceeded the scope of the privilege." Pet. App. 18a. The matter was then remanded to the trial court.

After a trial by jury, the jury returned a verdict in favor of Harris, awarding her $1.2 million in compensatory and punitive damages. The jury found specifically that defendant:

> (1) committed the intentional tort of slander *per se*; (2) was entitled to a qualified privilege as [Harris'] supervisor; (3) abused the qualified privilege he enjoyed; and (4) acted with malice when he defamed her [Pet. App. 3a].

The evidence presented to the jury in the trial leading to that verdict contained only incidental references to the governing labor agreement between Metro North and Harris' collective bargaining representative, BRAC. That evidence bore no relation to any factual or legal predicate to Harris' cause of action. Nor did Hirsh or his counsel rely on any interpretation of that agreement to support any of his defenses to that cause of action.[1] And, no mention was made of the labor agreement in the charge to the jury.

Hirsh moved to set aside the verdict, arguing, *inter alia*, that the slander claim is preempted by the Railway Labor Act. That motion was denied.

---

[1] Specifically, the labor agreement was the subject of the following trial testimony: Both Harris and Hirsh testified to the fact that subsequent to their meeting, Harris filed a grievance under the labor agreement challenging Hirsh's conduct at the meeting. Harris testified further that, subsequent to their meeting, her position was eliminated, that pursuant to the labor agreement she bid into another position at Metro North, and that she could have filed a grievance under that agreement challenging the elimination of her position, but chose not to. Finally, Hirsh testified that at the time of his meeting with Harris, he had not read Metro North's written substance abuse policy then in effect, and that he did not rely on that policy as a justification for the meeting.

On appeal from the resulting judgment, the state intermediate appellate court reversed the order denying the motion to set aside the verdict, and dismissed the complaint. Pet. App. 11a. That court ruled that the state courts lacked subject matter jurisdiction over the dispute because it "is one growing out of a grievance and 'indisputably arises out of the employment relation between the plaintiff and . . . Metro-North.'" Pet. App. 12a (citation omitted). That being so, the allegations "must be considered a 'minor dispute' within the meaning of the RLA and cannot be asserted as a basis for a common law claim." *Id.*

(b) *The New York Court of Appeals' Decision:* On appeal, the New York Court of Appeals affirmed the state intermediate appellate court's preemption ruling. The New York Court reasoned that "[a]ll claims that may properly be characterized as 'minor disputes' are subject exclusively to the arbitration procedures established by the RLA." Pet. App. 4a.

The court below defined minor disputes "expansively" as covering both claims "governed by the precise terms of a collective bargaining agreement, . . . but also those 'founded upon some incident of the employment relation.'" Pet. App. 5a, citing *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711, 723 (1945). This broad understanding of "minor dispute" was required, in the New York Court's view, to further "the congressional purpose of providing a comprehensive federal scheme for the settlement of employer-employee disputes in the railroad industry, without resort to the courts.'" Pet. App. 5a, quoting *Melanson v. United Airlines, Inc.*, 931 F.2d 558, 561, n.1 (9th Cir.), *cert. denied*, 112 S. Ct. 189 (1991).

From these principles the New York Court derived the following rule:

> [A] state defamation action—which typically will not be expressly governed by a specific labor contract term—will be preempted if the disputed statements were made in connection with conduct authorized by

> the governing collective bargaining agreement and concerned matters related to the employment relationship. . . . In other words, where the dispute turns on whether a provision of the collective bargaining agreement created a qualified privilege to discuss certain employment-related matters, and that privilege would serve as the employer's defense to the suit, the terms of the labor agreement are necessarily implicated. In such circumstances, the congressional goal that labor contracts negotiated under federal law receive uniform interpretation will only be furthered where the arbitration board acts as the final arbiter, and not the courts [Pet. App. 6a]

Applying that rule to the facts of this case, that court ruled that the claim here is preempted because

> at the time of the alleged slander, plaintiff was being interviewed regarding her work performance and her possible violation of the substance abuse policy. Thus, the alleged tortious conduct was 'inextricably intertwined' with a work related investigation that defendant Hirsh was authorized to undertake by the terms of the CBA. [Pet. App. 8a]

The New York Court concluded in this regard:

> Along with a number of courts that have addressed the issue, we conclude that the preemptive effect of the RLA is more pervasive than the preemptive effect of the Labor Management Relations Act, 29 U.S.C. § 185 (LMRA or Taft-Hartley Act), or the National Labor Relations Act, 29 U.S.C. § 151 (NLRA or Wagner Act) . . . two federal regulatory schemes with a purpose distinct from that of the RLA. Accordingly, we reject plaintiff's claim that the test for preemption under section 301 of the LMRA established in *Lingle v. Norge Div. of Magic Chef Inc.* (486 U.S. 399 [1988]—whether "resolution of a state law claim *depends upon* the meaning of a collective bargaining agreement" (emphasis added)—governs this case, and decline to apply the holding of *Linn v. United Plant Guard Workers* (383 U.S. 53 [1966])—that a malicious libel suit is not preempted by the NLRA—to this case. [Pet. App. 6a-7a]

At the same time, the court below observed that

> Adjudication of plaintiff's state tort claim would have been imposible without reference to conduct governed by the collective bargaining agreement since, in rendering its verdict, the jury here was required to specifically determine whether defendant's conduct was qualifiedly privileged under the labor contract and whether he exceeded the scope of that privilege. . . . In so doing, the jury necessarily trespassed upon the exclusive authority of the adjustment board to determine the manner in which an employer may enforce company policies. [Pet. App. 8a]

Shortly after the New York Court issued its decision, this Court decided *Livadas v. Bradshaw*, 114 S. Ct. 2068 (1994), and *Hawaiian Airlines, Inc. v. Norris*, 114 S. Ct. 2239 (1994). Harris then moved the New York Court to rehear this matter in light of these two decisions. That motion wa[s] summarily denied without opinion. Pet. App. 20a.

REASONS FOR GRANTING THE WRIT

The New York Court of Appeals' decision here issued on June 9, 1994. This Court's *Hawaiian Airlines v. Norris, supra*, decision issued on June 20, 1994. The New York Court's decision, on its face, rests on the expansive Railway Labor Act "labor contract" preemption doctrine *rejected* in this Court's *Hawaiian Airlines* decision. Nonetheless, the New York Court summarily denied without opinion a timely rehearing petition calling *Hawaiian Airlines* to its attention. In this situation, a grant of *certiorari*, a vacation of the judgment below and a remand for reconsideration in light of *Hawaiian Airlines* is, we submit, the proper—and, indeed, the required—course.

In responding to our rehearing petition, the respondent argued that the New York Court's decision could be read as resting on alternative holdings, with the second holding incorporating a particular understanding of the "labor con-

tract" preemption doctrine as stated in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988). According to respondent, the New York Court ruled that "plaintiff's defamation action clearly 'depends upon' an interpretation of the collective bargaining agreement and must be pre-empted."

On that reading of the decision below, this case raises the "labor contract" preemption question that has been answered in three conflicting ways by seven federal courts of appeals. In *Livadas v. Bradshaw, supra*, this Court acknowledged this division in the lower court law but did not resolve the conflict, since doing so was not necessary to the proper disposition of that case. And, on that reading, this case calls for this Court's review to resolve this deep-seated conflict over the correct answer to this frequently recurring "labor-contract" preemption question.

A. The New York Decision Conflicts With This Court's Decision in *Hawaiian Airlines, Inc. v. Norris*

In *Hawaiian Airlines*, the Court resolved a split in the state and lower federal courts on the question whether the "labor contract" preemption standard differs in cases governed by the Railway Labor Act and in cases governed by the Labor Management Relations Act. The Court held that the proper preemption standard under the RLA and LMRA is "virtually identical," 114 S. Ct. at 2247, and "adopt[ed] the . . . standard to resolve claims of RLA pre-emption" delineated in an LMRA case, *Lingle v. Norge Div. of Magic Chef Inc., supra*, 114 S. Ct. at 2249.

In so ruling, this Court recognized that prior to *Hawaiian Airlines* some state and lower federal courts held that, while there is no LMRA "labor contract" preemption when the state law claim at issue relies upon "state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract," 114 S. Ct. at 2248, RLA preemption is far broader, preempting "all employment-related disputes," *id.* at 2244. In *Hawaiian Airlines*, this Court *rejected* the proposition that the RLA so "broadly pre-empts substantive protections extended by

the States;" instead, said the Court, the RLA, like the LMRA, preempts only disputes "grounded in the collective-bargaining agreement." *Id.* at 2245. In making that judgment, the Court "expressly disavowed any language in *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711 (1945), suggesting" this overly broad view of RLA preemption. 114 S. Ct. at 2245.

The New York Court of Appeals in the instant case adopted and relied upon the precise understanding of RLA "labor contract" preemption that this Court *rejected* in *Hawaiian Airlines*. Indeed, that court invoked the same language in *Burley* that this Court "expressly disavowed," *see* Pet. App. 5a, as well as a federal court of appeals decision expressly overruled by this Court.[2] The New York Court then determined that all claims "founded upon some incident of the employment relation," whether or not they are contract claims, must be deemed preempted. Pet. App. 5a.

In so ruling, the New York Court specifically "reject[ed] plaintiff's claim that the test for preemption under section 301 of the LMRA established in *Lingle* . . . governs this case." Pet. App. 7a. Of course, *Hawaiian Airline*'s precise holding is that "*Lingle* provides the appropriate framework for addressing pre-emption under the RLA, and we adopt the *Lingle* standard to resolve claims of RLA pre-emption." 114 S. Ct. at 2249.

All this being so—and the New York Court of Appeals having denied a timely motion for rehearing calling its attention to this Court's *Hawaiian Airlines* decision—we submit that this case calls for the granting of *certiorari*, and for vacation of the judgment below with a remand to the New York Court for further consideration of this case consistent with *Hawaiian Airlines*.

---

[2] *Compare* Pet. App. 6a (relying upon *Lorenz v. CSX Transp. Inc.*, 980 F.2d 263 (4th Cir. 1992)), *with Hawaiian Airlines*, 114 S.Ct. at 2249, n.9 (identifying *Lorenz* as one of the casse taking the view contrary to that adopted by the Court).

B. The State Courts and Federal Courts of Appeals Are Split on the Question Whether Labor Contract Preemption Analysis Is Claim Centered

In response to our petition for rehearing to the New York Court of Appeals, respondent argued that the New York Court "took full account of" and adopted respondent's alternate argument that "plaintiff's claim was preempted even if the *Lueck/Lingle* standard applied," because "plaintiff's defamation action clearly 'depends upon' an interpretation of the collective bargaining agreement."

On that understanding of the New York Court's decision, that decision is in conflict with the decisions of three federal courts of appeals, and in accord with the decision of four other federal courts of appeals, on a repeatedly recurring federal question that is of major practical significance to the federal labor relations system.

1. In *Livadas v. Bradshaw*, 114 S.Ct. at 2078, n.18, this Court recognized that "disagreements . . . have arisen over the proper scope of [the Court's] earlier decisions" concerning "labor contract" preemption. Neither *Livadas* nor *Hawaiian Airlines* provided a proper litigation occasion for resolution of those disagreements, with the result that the disagreements still obtain. Subject to the point made in Part A above, pp. 8-9, this case provides the appropriate vehicle finally to resolve the most important of those disagreements. And, there can be no doubt that now that the Court has made it plain that there is a single general "labor contract" preemption standard, the time has come to harmonize what has become a "series of often contradictory [post-*Lingle*] decisions, so much so that 'federal preemption of state labor law has been one of the most confused areas of federal court litigation.'" *Galvez v. Kuhn*, 933 F.2d 773 (9th Cir. 1991), quoting *Note, The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 Yale L. J. 209 (1989).

The principal disagreement identified by the *Livadas* Court is this: Some of the lower courts have understood

the "labor contract" preemption doctrine to be one directed at assuring that when "a plaintiff's cause of action itself derives from the collective-bargaining agreement (and, by that agreement, belongs before an arbitrator)," that cause of action is one governed by federal labor contract law that preempts state law. *Livadas*, 114 S. Ct. 2078, n.18. On this view, claims that are in substance *breach of labor contract claims*, no matter how pled, must be treated as federal contract claims.

In contrast, as the *Livadas* Court noted, "in other instances, the argument is different in that [preemption is required if] a plaintiff's claim cannot be 'resolved' absent collective-bargaining agreement interpretation, *i.e.*, that a term of the agreement may or does confer a defense on the employer (perhaps because the employee or his union has negotiated away the state law right)." 114 S. Ct. at 2078, n.18.

(i) The Sixth Circuit has perhaps been most emphatic in embracing the first, "claim-centered," analysis, several times reiterating that "[i]t is *irrelevant* to the preemption question whether or not the employer can defend by showing it had the rights under the collective bargaining agreement to do what it did." *O'Shea v. Detroit News*, 887 F.2d 683, 687 (6th Cir. 1989) (emphasis added); *see also Fox v. Parker Hannifin Corp.*, 914 F.2d 795, 800 (6th Cir. 1990) ("a defendant's reliance on a [collective bargaining agreement] term purely as a defense does not result in section 301 preemption."). The Tenth Circuit has also embraced this "claim centered" analysis of "labor contract" preemption.[8]

(ii) In contrast, the Ninth Circuit, in two cases, has held that an employee's state law privacy claim is pre

---

[8] *Local No. 57 v. Bechtel Power Corp.*, 834 F.2d 884, 889 (10th Cir. 1987). *Cf. Hirras v. National Railroad Passenger Corp.*, 1994 U.S. App. Lexis 33082, at 11 (5th Cir., No. 92-5753, Nov. 22, 1994) ("if the claim is brought under state law without any reference to the CBA, then it is not preempted").

empted whenever the defendant employer contends that the privacy right is waived by the management rights—or some cognate—clause of the applicable collective bargaining agreement, whatever the merits of that defense. *Utility Workers v. Southern California Edison*, 852 F.2d 1083, 1086-87 (9th Cir. 1988); *Laws v. Calmat*, 852 F.2d 430, 433 (9th Cir. 1988). The First, Third and Eighth Circuits have reached the same conclusion regarding employer defenses raising questions of contract interpretation.[4]

(iii) Still another court has adopted a position in between these two polar positions. Thus, the Fourth Circuit has held that the mere invocation by an employer of a contractually-related affirmative defense is not enough to warrant preemption. Instead, a court faced with such a defense must determine if the defense does in truth require the court to engage in some quantum of contract interpretation, in which case the claim should be preempted. If, however, the defense is pretextual, or merely invokes the contract collaterally to establish that the defendant was not improperly motivated, the claim should not be preempted.[5]

In this aspect of the New York Court of Appeals decision, as noted, that court alligned itself with the First, Third, Eighth and Ninth Circuits and relied on the strongest form of the "employer defense" preemption rationale. For, it is beyond argument that the elements making out a slander claim under New York law may be —and were—established without making any reference to Harris' labor agreement whatsoever. Thus, under the

---

[4] *Capraro v. United Parcel Service*, 993 F.2d 328, 332 (3rd Cir. 1993); *Magerer v. John Sexton & Co.*, 912 F.2d 525, 530-531 (1st Cir. 1990); *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 118 (1st Cir. 1988); *Hanks v. General Motors Corp.*, 859 F.2d 67, 70 (8th Cir. 1988); *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620, 623 (8th Cir. 1989).

[5] *See Jackson v. Kimel*, 992 F.2d 1318, 1326 (4th Cir. 1993).

"claim centered" approach to labor contract preemption this slander claim would *not* have been preempted.

But, on this aspect of the New York Court's decision, Harris' claim *is* preempted because under New York law defendants in a slander action may assert a qualified defense if the defamatory statements are made in the context of an employee-employer relationship. And, that preemption result follows even though under New York law, that qualified defense is *defeated* if the defendant is found to have acted out of *actual common law malice*, a determination that does not turn on any contract interpretation question.[6]

On this view, a defendant's assertion that its actions were motivated solely by a desire to follow the labor agreement—even when that proper motive assertion is rejected by the jury as untrue—is sufficient to generate preemption. For it is only with regard to that motive issue that "reference to conduct governed by the collective bargaining agreement" is in any way relevant to this case. Pet. App. 8a. Thus, it is on that attenuated basis that employees working under a collective bargaining agreement that does *not*—and could *not*—grant the employer a right to publish malicious slanders for conduct occurring in the workplace, lose their state legal protection against malicious slanders.

This aspect of the decision below, then, is in accord with the decisions of the federal courts of appeals that hold that "labor contract" preemption is required even of otherwise independent state law claims, whenever the employer asserts a *defense* that arguably requires the finder of fact to "mak[e] reference to" a collective bargaining agreement. By the same token, it is wholly at odds with the decisions of the other federal courts of appeals that hold that the "labor contract" preemption doctrine is limited to cases in which plaintiffs attempt to vindicate

---

[6] *See Loughry v. Lincoln Bank*, 67 N.Y. 2d 369, 376 (N.Y. Ct. App. 1986).

what are in truth labor contract rights. And, it is equally at odds with the remaining federal court of appeals that holds that labor contract preemption, at the least, requires an employer defense that rests on an interpretation of the labor agreement that, if accepted, would defeat the plaintiff's claim.

In sum, as *Livadas* recognizes, the federal courts of appeals and the state courts are hopelessly split on whether the "labor contract" preemption doctrine applies whenever the labor agreement is invoked as part of a defense to an employee's independent state law claim. If the Court does not vacate the judgment for the reasons set forth in point A, *supra*, pp. 8-9, it should grant this *certiorari* petition and set this case down for plenary consideration to resolve this conflict.

2. We would be derelict if we did not close with two additional points.

(a) First, the varying understandings of "labor contract" preemption just discussed go to the very essence of the doctrine. The "claim centered" understanding of the doctrine rests on the understanding that the doctrine is, in its essence, a *forum selection* rule that assures that disputes that are in substance contract disputes, no matter how pled, are resolved through arbitration, when that is what the parties intended. Its major consequence is to assure a decision on the merits in the forum chosen by the contracting parties by mutual agreement (or, in the case of the RLA, by operation of law).

In contrast, in its broadest formulation, as in this case, the "labor contract" preemption doctrine is a powerful *substantive* doctrine that wholly eliminates state law protections for unionized workers for harms suffered in the workplace whenever the employer asserts a contractual justification for its conduct, regardless of the legal validity of that justification.

As we have previously shown, the New York Court ruled Harris' slander claim to be preempted solely because the employer asserted as an affirmative defense a proper motive claim that allegedly requires "reference" to the labor agreement. This is so, moreover, even though it is clear that the defense entirely lacks merit, and in any event, does not require the jury to engage in any contract interpretation whatsoever.

That is a potent draught indeed. In a case challenging the legality of conduct that occurred in a unionized workplace, it is nearly always possible for the employer to come up with an affirmative defense that creates a "need" to consult the labor agreement. If that is all that is required to preempt state tort and employee protective laws in the unionized workplace, then in practical terms, unionized workers will be denied all such legal protections.

Such a "labor contract" preemption doctrine is a qualitatively different doctrine than the one recognized by those courts that preempt only contractually-based claims, saving for unionized employees the full protections of the state minimum standard and tort laws that apply in the workplace setting generally.

A single federal preemption doctrine should not, we submit, generate this kind of gross disparity.

(b) Finally, the New York Court's decision, and the preemption doctrine it invokes, surely is wrong. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), makes it clear that it has never been part of Congress' purpose in enacting the federal collective bargaining laws to deprive unionized workers of the protections of state laws that apply across the board to other workers. Instead, the federal labor law was intended to *rest on*, and to *complement*, state laws that also govern the workplace. *Id.* at 751, 756. And, the New York Court's statement to the contrary notwithstanding, the federal collective bargaining laws do "not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law." *Allis-*

Chalmers Corp. v. Lueck, 471 U.S. 202, 212 (1985). As a general matter, the bare assertion that the labor agreement countenances certain conduct simply is no defense to a claim that the conduct violates a state tort or employee protective law.

The New York Court's overly broad view of labor contract preemption goes well beyond anything suggested or fairly encompassed in this Court's decisions in this area. As the *Livadas* Court recently reiterated,

> the preemption rule has been applied *only* to assure that the purposes animating § 301 will be frustrated neither by state laws purporting to determine 'questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow breaches of that agreement,' nor by the parties' efforts to renege on their arbitration promises by 'relabeling' as tort suits actions simply alleging breaches of duties assumed in collective-bargaining agreements. [114 S. Ct. at 2078 (emphasis supplied).]

The New York Court's decision, preempting a state law that poses absolutely no risk of so frustrating the federal scheme of collective bargaining, cannot be squared with *Livadas*.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DANIEL F. MCCARTHY
DANIEL A. MCCARTHY
36 West 44th Street
New York, NY 10036

MITCHELL M. KRAUS
3 Research Place
Rockville, MD 20850

MARK D. SCHNEIDER
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

APPENDICES

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

JOAN V. HARRIS,

Appellant,

v.

PAUL HIRSH,

Respondent.

OPINION OF THE COURT

TITONE, J.

On this appeal, we are called upon to determine whether the trial court lacked subject matter jurisdiction over plaintiff's common-law defamation action because it constituted a "minor dispute" within the exclusive purview of the mandatory grievance-to-adjustment board procedures established by the Federal Railway Labor Act (RLA) (45 USC § 151 *et seq.*). For the reasons that follow, we conclude that plaintiff's State law claim is preempted, and her exclusive remedy lies with the arbitration procedures established under the RLA.

Plaintiff Joan Harris was employed by Metro-North Commuter Railroad (Metro-North) as a crew dispatcher and was a member of the Brotherhood of Railway, Airline and Steamship Clerks (BRAC) collective bargaining unit. The terms of plaintiff's employment were governed by a collective bargaining agreement (CBA) entered into between Metro-North and BRAC. On July 16, 1986, defendant Hirsh, plaintiff's former supervisor, called plaintiff into his office to discuss her work performance. Plaintiff alleges that during that encounter, and in the presence

of plaintiff's two immediate supervisors who were invited to attend the meeting, defendant Hirsh asked plaintiff whether she had a problem, and then stated to her: "You take drugs. I've worked in the Towers, and I know a person who is on drugs and you look like one. I've been thinking about sending you for a drug test." During the meeting, defendant Hirsh also indicated that he was suspicious that plaintiff used drugs because on a prior occasion he had observed her give an "incoherent" answer to a co-worker who had posed a question. Defendant's remarks were eventually circulated among plaintiff's coworkers.

By letter dated August 7, 1986, plaintiff requested that the BRAC district chair institute an investigation and grant her an "unjust treatment" hearing pursuant to rule 52 of the CBA [1] to determine whether defendant's conduct during the July 16 meeting violated company policy and procedure.[2] Plaintiff thereafter commenced this slander action in State court, alleging that defendant's false and defamatory words damaged her reputation and caused her to suffer mental anguish and physical injuries. Defendant Hirsh asserted as affirmative defenses that the court lacked subject matter jurisdiction over the defamation claim because it was preempted by the mandatory arbitration provisions set forth in the RLA, and that defendant's comments were made in the context of a supervisor-employee interview and were thus subject to a qualified privilege.

At the commencement of trial, defendant moved to dismiss the complaint on the jurisdictional ground. Su-

---

[1] Rule 52, entitled "Unjust Treatment," provides: "An employee who considers himself[/herself] unjustly treated except for discipline matters shall have the * * * right of investigation, hearing on appeal and representation * * * if written request which sets forth the employee's complaint is made to his[/her] supervising officer within thirty (30) calendar days of cause of complaint."

[2] Although plaintiff was granted that hearing on administrative appeal, it has been postponed pending the conclusion of this action.

preme Court denied the motion. To support plaintiff's claim at trial that defendant knowingly uttered false statements about plaintiff's purported drug use, plaintiff introduced uncontradicted testimony that her two immediate supervisors had previously told defendant, in response to his inquiry, that plaintiff was not on drugs. Plaintiff also introduced three documents as exhibits: the Metro-North substance abuse policy, her August 7, 1986 letter requesting a rule 52 unjust treatment hearing, and a letter written by defendant on February 12, 1987 informing her that her position had been abolished. Thereafter, the jury returned a verdict in favor of plaintiff, finding specifically that defendant (1) committed the intentional tort of slander per se, (2) was entitled to a qualified privilege as her supervisor, (3) abused the qualified privilege he enjoyed, and (4) acted with malice when he defamed her. The jury awarded plaintiff $1.2 million in compensatory and punitive damages. Defendant moved to set aside the verdict, again arguing Federal preemption. The motion was denied.

The Appellate Division reversed the order denying the motion to set aside the verdict and dismissed the complaint. The Court concluded that the trial court lacked subject matter jurisdiction by virtue of Federal preemption. In so holding, the Court determined that the allegations raised in plaintiff's State law complaint must be considered "a 'minor dispute' within the meaning of the RLA" because the claim "is one growing out of a grievance and 'indisputably arises out of the employment relation between the plaintiff and * * * Metro-North' " (196 AD2d 425, 426, quoting *Angelo v Metro-N. Commuter R. R.*, 193 AD2d 525). We now affirm.

Congress enacted the RLA (45 USC §§ 151-163) to stabilize labor-management relations in the rail and air carrier industries and to ensure uniform application of Federal law in the interpretation of labor agreements (*Atchison, Topeka & Santa Fe Ry. Co. v Buell*, 480 US 557, 562 [1987]). The act establishes a comprehen-

sive scheme for the orderly and prompt resolution of disputes between covered carriers and their employees that could potentially interrupt service and affect the Nation's commerce (*Union Pac. R. R. Co. v Sheehan*, 439 US 89, 94 [1978]). To achieve the congressional goal of "keeping railroad labor disputes simple and out of the reach of the often lengthy court process" (*Grote v Trans World Airlines*, 905 F2d 1307, 1309 [9th Cir], *cert denied* 498 US 958 [1990]), the RLA gives the National Railroad Adjustment Board, or an adjustment board jointly established by the employer and the representative unions (*see*, 45 USC § 153 [First] [i]; [Second]) primary and exclusive jurisdiction to resolve what have been termed "minor disputes" between covered carriers and their employees (*Elgin, Joliet & E. Ry. Co. v. Burley*, 325 US 711, 723 [1945]). "Minor disputes," statutorily defined as all "disputes between an employee * * * and a carrier * * * growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" (45 USC § 153 [First] [i], are subject to binding and compulsory arbitration under the RLA (45 USC § 153).[3]

All claims that may properly be characterized as "minor disputes" are subject exclusively to the arbitration procedures established by the RLA, even if the disputes could otherwise provide the basis for State tort remedies (*Magnuson v Burlington N.*, 576 F2d 1367 [9th Cir], *cert denied* 439 US 930 [1978]). Thus, a plaintiff cannot circumvent the RLA's mandatory dispute resolution provisions by recharacterizing or disguising a minor dispute as one grounded on State common law (*Lorenz v CSX Transp.*, 980 F2d 263, 268 [4th Cir 1993]; *Magnuson*, 576 F2d 1367, 1369, *supra*).

---

[3] By contrast, "major disputes" involve claims arising from the negotiation or formation of the collective bargaining agreement itself, and are not subject to the grievance-to-arbitration dispute resolution procedures (*see, Burley*, 325 US 711, 723, *supra*).

To prevent an aggrieved employee from avoiding the mandatory RLA arbitration provisions, the courts have defined preempted "minor disputes" expansively (*Consolidated Rail Corp. v Railway Labor Executives*, 491 US 299, 307 [1989]). A dispute will clearly be deemed "minor" within the meaning of the RLA when "the terms of an existing agreement either establish or refute the presence of a right to take the disputed action" (*id.*, at 305). However, the fact that a claim is not expressly governed by precise terms of a collective bargaining agreement is not fatal for purposes of RLA preemption. Minor disputes will include not only claims concerning "the meaning or proper application of a particular [CBA] provision," but also those "founded upon some incident of the employment relation," although not expressly covered by a contract term (*Burley*, 325 US 711, 723, *supra*). A commonly followed restatement of the governing inquiry is that the RLA grievance provisions will preempt State tort actions when the underlying claims are "based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the R.L.A." (*Magnuson*, 576 F2d 1367, 1369, *supra.*)

The purpose of defining "minor disputes" broadly is clear: "[i]f the pleading of emotional injury permitted aggrieved employees to avoid the impact of the R.L.A., the congressional purpose of providing a comprehensive federal scheme for the settlement of employer-employee disputes in the railroad industry, without resort to the courts, would be thwarted" (*Magnuson*, 576 F2d 1367, 1369, *supra*, cited in *Melanson v United Air Lines*, 931 F2d 558, 561, n. 1, *cert denied* —— US ——, 112 S Ct 189 [1991]). In other words, an employee should not be permitted to disguise or restate a genuine contract claim in terms of tort or to extract parasitic tort claims from an employment-related grievance to obtain remedies outside of those contemplated by the RLA.

It follows from those principles that a State defamation action—which typically will not be expressly governed by a specific labor contract term—will be preempted if the disputed statements were made in connection with conduct authorized by the governing collective bargaining agreement and concerned matters related to the employment relationship (*see, Gay v Affourtit*, 1993 WL 438923, 2 [US Dist Ct, SD NY 1993 [libel action preempted where collective bargaining agreement between airline and aircraft crew members must be consulted to determine whether crew had qualified privilege to report misconduct of pilot, even if reports turn out to be false and defamatory]). In other words, where the dispute turns on whether a provision of the collective bargaining agreement created a qualified privilege to discuss certain employment-related matters, and that privilege would serve as the employer's defense to the suit, the terms of the labor contract are necessarily implicated. In such circumstances, the congressional goal that labor contracts negotiated under Federal law receive uniform interpretation will only be furthered where the arbitration board acts as the final arbiter, and not the courts. The State law claim may survive, however, if "the alleged defamation becomes distanced from the work-place and is only 'peripherally' concerned with federal labor law" (*Lorenz v CSX Transp.*, 980 F2d 263, 267 [4th Cir 1992], *supra; see also Rosemond v National R. R. Passenger Corp.*, 1986 WL 10711 [US Dist Ct, SD NY 1986]).

Along with a number of courts that have addressed the issue, we conclude that the preemptive effect of the RLA is more pervasive than the preemptive effect of the Labor Management Relations Act, 29 USC § 185 *et seq.* (LMRA or Taft-Harley Act), or the National Labor Relations Act, 29 USC § 151 *et seq.* (NLRA or Wagner Act) (*see, Lorenz v CSX Transp.*, 980 F2d 263, 268, *supra; Melanson v United Air Lines*, 931 F2d 558, 562, *supra; Grote v Trans World Airlines*, 905 F2d 1307, 1309-1310 [9th Cir 1990]; *DeTomaso v Pan Am. World*

Airways, 43 Cal 3d 517, 528, 733 P2d 614 (1987]), two Federal regulatory schemes with a purpose distinct from that of the RLA *(see generally, Andrews v Louisville & Nashville R. R. Co.*, 406 US 320, 323 [1972]). Accordingly, we reject plaintiff's claim that the test for preemption under section 301 of the LMRA (29 USC § 185) established in *Lingle v Norge Div. of Magic Chef* (486 US 399 [1988])—whether "resolution of a state-law claim *depends upon* the meaning of a collective bargaining agreement" (*supra*, at 405-406 [emphasis added])—governs this case, and decline to apply the holding of *Linn v Plant Guard Workers* (383 US 53 [1966])—that a malicious libel suit is not preempted by the NLRA—to this case.

We also reject, as a creative attempt " 'to evade the mandatory arbitration provisions of the [RLA]' " any suggestion that the preemptive effect of the RLA does not apply to suits, such as this one, brought by an employee against a co-worker in an individual capacity *(Henegar v Banta*, 817 F Supp 668, 672 [ND Ohio 1993], quoting *Gray v Chessie Sys.*, 588 F Supp 1334, 1337 [D Md 1984]; *see also, Gay v Affourtit*, 1993 WL 438923, 3 [US Dist Ct, SD NY 1993], *supra; Gonzalez v Northwest Airlines*, 201 NJ Super 422, 427-428, 493 A2d 547). The claimed distinction between suits brought against the carrier and those brought against an employee individually ignores the explicit language of the RLA which provides that "*any disputes*" (45 USC § 153 [First] [j]) "concerning rates of pay, rules, or working conditions" are to be promptly settled by the established arbitration procedures (45 USC § 153 [First] [i] [emphasis added]). It also ignores the RLA's legislative history, which indicates that Congress "intended to protect the public from the injuries and losses consequent upon any impairment or interruption of interstate commerce through failure of *managers and employees* to settle peaceably their controversies" (HR Rep No. 328, 69th Cong., 1st Sess 1 [emphasis added]).

Applying the aforementioned principles, we conclude that plaintiff's slander action is preempted and the trial court lacked subject matter jurisdiction to entertain it. The substance of plaintiff's claim is that defendant falsely accused her of drug use during the July 16 meeting and failed to comply with the negotiated policies and procedures governing such inquires. At the time of the alleged slander, plaintiff was being interviewed regarding her work performance and her possible violation of the substance abuse policy. Thus, the alleged tortious conduct was "inextricably intertwined" with a work-related investigation that defendant Hirsh was authorized to undertake by the terms of the CBA *(see, Magnuson*, 576 F2d 1367, 1369, *supra)*. Accordingly, the defamation action is a preempted "minor dispute" *(see, Lorenz*, 980 F2d, at 268, *supra; Magnuson*, 576 F2d 1367, *supra; cf., Rosemond v National R. R. Passenger Corp.*, 1986 WL 10711 [SD NY 1986], *supra)*.

The State action against defendant "in essence and substance" concerned the application or interpretation of company rules embodied in Metro-North's CBA *(see, Carson v Southern Ry. Co.*, 494 F Supp 1104, 1110 [D SC 1979]). Adjudication of plaintiff's State tort claim would have been impossible without reference to conduct governed by the collective bargaining agreement since, in rendering its verdict, the jury here was required to specifically determine whether defendant's conduct was qualifiedly privileged under the labor contract and whether he exceeded the scope of that privilege *(see, Choate v Louisville & Nashville R. R. Co.*, 715 F2d 369, 372 [7th Cir 1983]). In finding that defendant did not have the authority under the collective bargaining agreement to engage in the exchange with plaintiff in the manner that he did, the jury had to second-guess whether defendant Hirsh conducted the investigation of plaintiff within the dictates of the labor agreement. In so doing, the jury necessarily trespassed upon the exclusive authority of the adjustment board to determine the manner in which an employer may enforce company policies.

The risk to be avoided by the provisions for the board's exclusive jurisdiction—that a State court ruling may be inconsistent with a Federal adjustment board determination on the same employment issue—is present here. Notably, plaintiff claimed at trial that defendant Hirsh knew that his statements were false—and thus were maliciously uttered—because plaintiff's two immediate supervisors previously told defendant that plaintiff did not use drugs. However, the terms of the Metro-North substance abuse policy authorize a supervisor to proceed with an employee substance abuse investigation by relying "solely on evidence of behavior, personal observations, or other evidence customarily relied upon in investigations or hearings." Thus, plaintiff's theory that defendant's reliance upon his own observations here constituted malice could well be seen as unsustainable in light of the terms of the agreement which permit such conduct.

The trial record also supports defendant's contention that plaintiff's tort action constituted a preempted "disguised" contract claim. As additional proof of defendant's malice, plaintiff introduced, over objection, a letter written to her by defendant some six months after the July 16 meeting notifying her that her position had been abolished. Plaintiff's reliance upon this document at trial suggests that through the "disguised" State tort defamation action, plaintiff interjected into the litigation the claim that she was "unjustly treated" and ultimately "forced out" of her position—matters entrusted to the sole jurisdiction of the adjustment board under the RLA *(see, Carson v Southern Ry. Co.*, 494 F Supp 1104, 1112, *supra)*.

Finally, the contention that preemption of State tort claims by the RLA penalizes railway workers for being governed by a collective bargaining agreement lacks merit. The grievance-to-arbitration procedures made available to employees governed by the RLA provide a valuable benefit, albeit different from the relief that may be obtained through judicial intervention: a ready forum to promptly resolve employment-related disputes and redress griev-

ances without any cost of litigation to the employee *(see, Union Pac. R. R. Co. v Sheehan*, 439 US 89, 94, *supra)*. In any event, the determinative inquiry is not whether an employee could obtain more favorable relief in State court, but whether the dispute is "minor" within the meaning of the RLA and the grievance procedure established by the RLA is intended by Congress to be the plaintiff's exclusive remedy, as it is here *(see, Magnuson*, 576 F2d, at 1369-1370, *supra; United Airlines v Superior Ct.*, 234 Cal App 3d 1085, 1091, 286 Cal Rptr 159 [1991]).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Judges SIMONS, BELLACOSA, SMITH, LEVINE and CIPARICK concur; Chief Judge KAYE taking no part.

Order affirmed, with costs.

APPENDIX B

SUPREME COURT OF NEW YORK
APPELLATE DIVISION
FIRST DEPARTMENT

JOAN V. HARRIS,

Respondent,

v.

PAUL HIRSH,

Appellant.

Judgment, Supreme Court, Bronx County (Hansel McGee, J.), entered May 7, 1992, which, after jury trial, awarded plaintiff $1,205,420, and order, same court and Justice, entered February 22, 1993, which denied defendant's motion to set aside the verdict, unanimously reversed, on the law, without costs, and the complaint dismissed. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

The parties were employees of Metro-North Commuter Railroad ("Metro-North"), defendant a supervisor and plaintiff a crew dispatcher. The complaint alleges that on July 16, 1986, in the presence of two intermediate supervisors, defendant asked if plaintiff had a problem and suggested that she might be taking drugs. Plaintiff then brought this action for slander. Defendant in his answer pleaded, among his defenses, lack of subject matter jurisdiction, arguing that the slander claim was preempted by the Railway Labor Act (RLA; 45 USC § 151 *et seq.*). Justice Anita Florio dismissed that defense on November 23, 1987. Defendant, however, denied having been served with the order and, on April 1, 1992, after jury selection,

moved for dismissal on the same grounds. Justice McGee found no preemption and denied the motion.

An objection to subject matter jurisdiction may be taken at any stage of an action, including on appeal (*Marine Midland Bank v Bowker*, 89 AD2d 194, 195-196, *affd* 59 NY2d 739; *Matter of Anthony J.*, 143 AD2d 668, 669). Whether or not Justice McGee was bound by Justice Florio's order as the law of the case, this Court may reverse his order if it is substantively incorrect (*Post v Post*, 141 AD2d 518, 519). It is substantively incorrect.

In *Angelo v. Metro N. Commuter R. R.* (193 AD2d 525), this Court held that pursuant to the RLA the State common-law remedies which might otherwise be invoked were preempted. There, a Metro-North policeman had been accused of stealing and, after a disciplinary hearing, was found guilty and dismissed from the force. On appeal to the Railroad Adjustment Board, however, the Board Referee held that the misconduct had not been proved. The policeman was ordered reinstated. He then brought an action in the State court for malicious prosecution; but this Court dismissed his complaint, holding that the dispute between the parties was a " 'minor dispute' " within the meaning of the statute, and was "to be resolved exclusively by means of the procedures set forth in the Act" and that State common-law remedies which might otherwise be invoked were preempted (193 AD2d, *supra*, at 527-528).

As in *Angelo*, the dispute here is one growing out of a grievance and "indisputably arises out of the employment relation between the plaintiff and * * * Metro-North" (*supra*, at 527); despite the allegation of irregularities in the disciplinary process, any misfeasance is no less related to the collective bargaining agreement, and the allegations thereof must be considered a "minor dispute" within the meaning of the RLA and cannot be asserted as a basis for a common-law claim. Nor is the discharge of the em-

ployee or the filing of formal charges a prerequisite for preemption.

Since the State courts lack subject matter jurisdiction, the remaining questions raised by defendant need not be considered. Concur—Milonas, J. P., Rosenberger, Rubin and Nardelli, JJ.

APPENDIX C

SUPREME COURT
STATE OF NEW YORK
COUNTY OF BRONX

Index No. 8065/87

JOAN V. HARRIS,

Plaintiff,

-against-

PAUL HIRSH,

Defendant.

The issues in this action having been duly tried before the Honorable Hansel L. McGee, and a jury, at an IAS Term, Part 5 of this Court, held at the Bronx County Courthouse from March 24, 1992, to April 23, 1992, and the plaintiff, JOAN V. HARRIS, having duly appeared by her attorneys, Graham, Campaign & McCarthy, P.C., and the defendant, PAUL HIRSH, having duly appeared by his attorney, Jose Rios, Esq., and the jury having rendered a verdict on the 23rd day of April, 1992 in favor of the plaintiff, and against defendant, for damages in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS in compensatory damages and SEVEN HUNDRED THOUSAND ($700,000.00) DOLLARS in punitive damages, and the plaintiff's costs and disbursements having been duly taxed by the Clerk in the sum of One Thousand Two Hundred Twenty ($1,220.00) DOLLARS.

Now on motion of Graham, Campaign & McCarthy, P.C., attorneys for plaintiff, it is

Adjudged that plaintiff, JOAN V. HARRIS, residing at 434 Poplar Street, Bridgeport, Connecticut 06605, re-

cover of the defendant, PAUL HIRSH, residing at 46 Thompson Avenue, Croton-on-Hudson, New York 10520, the sum of ONE MILLION-TWO HUNDRED THOUSAND ($1,200,000.00) DOLLARS, together with interest thereon from April 23, 1992 in the sum of Forty-Two Hundred ($4,200.00) DOLLARS, and with costs and disbursements as taxed in the sum of One Thousand Two Hundred Twenty ($1220.00) DOLLARS, making in all the sum of One Million Two Hundred and Five Thousand, Four Hundred Twenty ($1,205,420.00) DOLLARS, and that the plaintiff, JOAN V. HARRIS have execution therefor.

Judgment signed May 7, 1992.

/s/ [Illegible]
Clerk

APPENDIX D

SUPREME COURT OF NEW YORK
APPELLATE DIVISION
FIRST DEPARTMENT

JOAN V. HARRIS,

Appellant,

v.

PAUL HIRSH,

Respondent.

Order, Supreme Court, Bronx County (Anita Florio, J.), entered November 9, 1988, which granted defendant-respondent's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, and summary judgment denied, without costs.

Plaintiff, an employee of Metro-North Commuter Railroad (Metro-North) from 1977 to 1986, brought this action alleging slander against defendant, the head of her department. The gravamen of the complaint is that, on July 16, 1986, without cause, defendant called her into his office and, in the presence of two supervisors, stated "[y]ou have a problem. You take drugs. * * * I know a person who is on drugs and you look like one." Plaintiff further asserted that no precautions were taken to ensure that these statements were not repeated.

Defendant subsequently moved, pursuant to CPLR 3212, for summary judgment, claiming qualified privilege, in that the statements were made in the context of an employer-employee relationship. Plaintiff duly and vigorously opposed the motion. Included with plaintiff's op-

position papers were excerpts of defendant's and plaintiff's deposition testimony, the negative results of plaintiff's drug tests, and affidavits of fellow employees to the effect that defendant's accusations had spread to the other employees of her department. A copy of Metro-North's Operating Procedures and Directives was also submitted, in order to demonstrate that defendant did not follow proper procedures and policy regarding suspected drug abuse. Plaintiff also contends that the two supervisors had advised defendant that she did not use drugs. As additional proof of malice, plaintiff submitted a copy of a letter dated February 12, 1987, from defendant to plaintiff, which was subsequent to the date plaintiff commenced the within action, by which he abolished her job.

The IAS court granted summary judgment dismissing the complaint, stating, *inter alia*, that the statements were made under circumstances which entitled defendant to the defense of qualified privilege and, further, that plaintiff failed to raise an issue of fact as to whether the statements were made maliciously, thereby vitiating the defense. Plaintiff now appeals.

Summary judgment dismissing a complaint, while a drastic remedy, is properly granted where there are no material issues of fact. (*See*, CPLR 3212.) Thus, the focus is upon issue finding, rather than issue determination. (*Marshall, Bratter, Greene, Allison & Tucker v. Mechner*, 53 AD2d 537 [1st Dept 1976].) Plaintiff asserts that there are hotly contested issues of fact which should be determined by a jury.

In analyzing whether there are triable issues of fact, we are aware that the law confers a qualified privilege on a statement where it " 'is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where the interest is concerned.' " (*Toker v Pollak*, 44 NY2d 211, 219 [1978], quoting *Lovell Co. v. Houghton*, 116 NY 520, 526.) The defense of qualified privilege

may be invoked when a defendant's acts were for a proper purpose and exercised in a reasonable manner; however, it "is forfeited if the defendant steps outside of the scope of the privilege, or abuses the occasion." (Prosser and Keeton, Torts, at 832 [5th ed].)

Assuming, arguendo, that defendant's statements are qualifiedly privileged, the burden of proof falls upon plaintiff to set forth evidence that defendant was motivated by malice. (*Garson v Hendlin*, 141 AD2d 55, 63 [2d Dept 1988], *lv denied* 74 NY2d 603; *Shulman v Anderson Russell Kill & Olick*, 117 Misc 2d 162, 169 [Sup Ct, NY County 1982].) Accordingly, plaintiff must demonstrate that the allegedly defamatory statements were known to be false at the time they were made to sufficiently raise a triable question of fact for the jury. (*O'Rorke v Carpenter*, 55 NY2d 798 [1981].)

Upon our review of the instant record, we conclude that plaintiff has submitted evidentiary proof that defendant knew in advance of the subject incident that plaintiff was not "on drugs". Moreover, we believe that plaintiff may succeed in convincing a jury that defendant's statements were made in furtherance of an improper purpose. Indeed, the evidence before us makes it abundantly clear that the statements may well have exceeded the scope of the privilege. Plaintiff is entitled to have a jury resolve these questions. In reversing the IAS court, we now give her that opportunity. Concur—Murphy, P. J., Carro, Milonas, Asch and Wallach, JJ.

APPENDIX E

[Filed Nov. 3, 1988]

SUPREME COURT
STATE OF NEW YORK
COUNTY OF BRONX

Index No. 8065/87

Justice Florio

JOAN V. HARRIS,

Plaintiff,

-against-

PAUL HIRSH,

Defendant.

ORDER

Upon defendant's motion for summary judgment to dismiss the complaint, and plaintiff having appeared in opposition, upon all the pleadings and papers filed herein, and after due consideration of all arguments in support or opposition thereto, it is hereby ordered that:

Defendant's motion is granted in its entirety and the complaint is dismissed.

Oct. 31, 1988

/s/ AF
ANITA FLORIO
Justice, Supreme Court
Bronx County

APPENDIX F

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of September 1994

Present, HON. RICHARD D. SIMONS,
Senior Associate Judge, presiding

Mo. No. 940

JOAN V. HARRIS,

Appellant,

v.

PAUL HIRSH,

Respondent.

A motion for reargument to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Chief Judge Kaye took no part.

/s/ Donald M. Sheraw
DONALD M. SHERAW
Clerk of the Court